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CENTER FOR ENVIRONMENTAL HEALTH
7

**ENDORSED
FILED**
San Francisco County Superior Court

APR 20 2011

CLERK OF THE COURT
BY: GINA GONZALES
Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10

11 CENTER FOR ENVIRONMENTAL HEALTH,)

12 Plaintiff,)

13 v.)

14)
15 BASIC INTERNATIONAL, INC. DBA BASIC)
16 MEDICAL INDUSTRIES, INC.; DASH)
17 MEDICAL GLOVES, INC.; AMMEX)
18 CORPORATION; BIG TIME PRODUCTS,)
19 LLC; BOSS MANUFACTURING COMPANY;)
20 GOLDMAX INDUSTRIES, INC.; PRO-STAT,)
21 INC.; RITE AID CORPORATION; and)
22 Defendant DOES 1 through 200, inclusive,)

23 Defendant.)
24)
25)
26)
27)
28)

Case No.: CGC-09-494337

~~[PROPOSED]~~ CONSENT
JUDGMENT RE: CYPRESS
MEDICAL PRODUCTS LLC

1 **1. INTRODUCTION**

2 **1.1** On November 10, 2009, Plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint entitled *Center*
4 *for Environmental Health v. Basic International, Inc. dba Basic Medical Industries, Inc., et al.*,
5 San Francisco County Superior Court Case Number CGC-09-494337 (the “Action”), for civil
6 penalties and injunctive relief pursuant to the provisions of Cal. Health & Safety Code § 25249.5,
7 *et seq.* (“Proposition 65”). On December 22, 2009, CEH amended the Complaint to name Rite
8 Aid Corporation as a defendant. On October 18, 2010 CEH amended the Complaint to name
9 Cypress Medical Products LLC (“Defendant”) as a defendant. CEH and Defendant are referred to
10 herein individually as a “Party” and collectively as the “Parties.”

11 **1.2** Defendant is a corporation that employs 10 or more persons and
12 manufactured, distributed and/or sold vinyl gloves (the “Products”).

13 **1.3** On or about August 4, 2009, CEH served Rite Aid Corporation and the
14 appropriate public enforcement agencies with the requisite 60-day Notice alleging that Rite Aid
15 Corporation was in violation of Proposition 65. On or about July 2, 2010, CEH served
16 Defendant and the appropriate public enforcement agencies with the requisite 60-day Notice
17 alleging that Defendant was in violation of Proposition 65 (the “Notice”). The Notice and the
18 Complaint in the Action allege that Defendant exposes people who use or otherwise handle the
19 Products to di(2-ethylhexyl) phthalate (“DEHP”), a chemical known to the State of California to
20 cause cancer, birth defects and other reproductive harm, without first providing clear and
21 reasonable warning to such persons regarding the carcinogenicity and reproductive toxicity of
22 DEHP. After serving Defendant with the Notice, CEH was informed that Defendant was the
23 supplier responsible for the Products sold by Rite Aid Corporation that were identified in CEH’s
24 August 4, 2009 notice to Rite Aid Corporation. The Notice and Complaint allege that
25 Defendant’s conduct violates Health & Safety Code § 25249.6, the warning provision of
26 Proposition 65. Defendant disputes such allegations and asserts that all of its products are safe and
27 comply with all applicable laws.
28

1 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this
2 Court has jurisdiction over the subject matter of the violations alleged in CEH's Complaint and
3 personal jurisdiction over Defendant as to the acts alleged in CEH's Complaint, that venue is
4 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
5 Judgment as a full and final resolution of all claims which were or could have been raised in the
6 Complaint based on the facts alleged therein.

7 1.5 The Parties enter into this Consent Judgment pursuant to a settlement of
8 certain disputed claims between the Parties as alleged in the Complaint. By executing this Consent
9 Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties' intent that
10 nothing in this Consent Judgment shall be construed as an admission by the Parties of any fact,
11 conclusion of law, issue of law or violation of law, nor shall compliance with the Consent
12 Judgment constitute or be construed as an admission by the Parties of any fact, conclusion of law,
13 issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or
14 impair any right, remedy, argument or defense the Parties may have in this or any other or future
15 legal proceedings.

16 **2. COMPLIANCE - REFORMULATION**

17 **2.1 Reformulation Standard – Removal of DEHP.** After sixty (60) days
18 following the entry of this Consent Judgment (the "Compliance Date"), Defendant shall not
19 manufacture, distribute, ship, or sell, or cause to be manufactured, distributed or sold, any
20 Product that contains in excess of trace amounts of DEHP. For purposes of this Consent
21 Judgment only, "in excess of trace amounts" is more than 600 parts per million ("ppm"). In
22 reformulating the Products to remove DEHP, Defendant may not use butyl benzyl phthalate
23 ("BBP"), di-n-hexyl phthalate ("DnHP"), di-n-butyl phthalate ("DBP") or di-isodecyl phthalate
24 ("DIDP") in excess of trace amounts. DEHP, BBP, DnHP, DBP and DIDP are together referred to
25 herein as "Listed Phthalates."

26 **2.2 Certification From Suppliers.** Defendant shall issue specifications to
27 its suppliers requiring that the Products shall not contain DEHP or any other Listed Phthalate
28 in excess of trace amounts. Defendant shall obtain written certification from its suppliers of the

1 Products certifying that the Products do not contain any Listed Phthalate in excess of trace
2 amounts.

3 **2.3 Defendant's Testing.** In order to ensure compliance with the
4 requirements of Section 2.1, Defendant shall cause to be conducted testing to confirm that
5 Products sold do not contain any Listed Phthalate in excess of trace amounts. Testing shall be
6 conducted in compliance with Section 2.1. All testing pursuant to this Section shall be performed
7 by an independent laboratory in accordance with one of the following test protocols: (1) EPA
8 SW8270C and EPA SW3580A, (2) ASTM D3421-75, (3) or ARDL1AUTO Gas
9 Chromatography/Mass Spectrometry as set forth in the protocol attached hereto as Exhibit
10 A (referred to collectively as the "Test Protocols"). At the request of CEH, the results of the
11 testing performed pursuant to this section shall be made available to CEH on a confidential
12 basis.

13 **2.3.1 Testing Frequency.** For each of the first two orders of Products
14 purchased from each of Defendant's suppliers after the Compliance Date, Defendant shall
15 randomly select and test one glove from each of the greater of 0.1% (one-tenth of one percent) or
16 eight, but in no case more than ten, of the total boxes of Products purchased from each supplier
17 of the Products intended for sale. For a period of two years following the completion of the
18 testing of the first two orders as described above, Defendant shall randomly select and test,
19 from each such supplier, as follows: for at least one purchase order every six months, one glove
20 from each of the greater of 0.05% (one-twentieth of one percent) or four, but in no case more
21 than five, of the total boxes of Products the total boxes of Products in that purchase order.

22 **2.3.2 Products That Contain Listed Phthalates Pursuant to**
23 **Defendant's Testing.** If the results of the testing required pursuant to Section 2.3 show Listed
24 Phthalates in excess of trace amounts in a Product, Defendant shall: (1) refuse to accept all of the
25 Products that were purchased under the particular purchase order tested; (2) send a notice to the
26 supplier explaining that such Products do not comply with the suppliers' certification; and (3)
27 apply the testing frequency set forth in Section 2.3.1 as though the next shipment from the
28 supplier were the first one following the Compliance Date.

1 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory
2 testing of the Products. Any such testing shall be conducted by CEH at an independent
3 laboratory, in accordance with any of the Test Protocols. In the event that CEH's testing under any
4 of the Testing Protocols demonstrates that the Products contain Listed Phthalates in excess of trace
5 amounts subsequent to the Compliance Date, CEH shall inform Defendant in a reasonably
6 prompt manner of the test results, including information sufficient to permit Defendant to
7 identify the Product(s). Defendant shall, within 30 days following such notice, provide CEH, at
8 the address listed in Section 11.1, with the certification and testing information demonstrating its
9 compliance with Sections 2.2 and 2.3 of this Consent Judgment. If Defendant fails to provide
10 CEH with information demonstrating that it complied with Sections 2.2 and/or 2.3, Defendant shall
11 be liable for stipulated payments in lieu of penalties for Products for which CEH produces tests
12 demonstrating the presence of Listed Phthalates in excess of trace amounts in the Products. The
13 payments shall be made to CEH and used for the purposes described in Section 3.2.

14 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated
15 payments in lieu of penalties are warranted under Section 2.4, the stipulated payment amount shall
16 be as follows for each Occurrence of Defendant selling a Product containing Listed Phthalates
17 in excess of trace amounts after the Compliance Date:

18	First Occurrence:	\$500
19	Second Occurrence:	\$750
20	Third Occurrence:	\$1,000
21	Thereafter:	\$2,500

22 In the event that Defendant provides information, in accordance with Section 2.4, that it believes
23 demonstrates its compliance with Sections 2.2 and 2.3 of the Consent Judgment, and CEH
24 disputes such a claim, CEH shall have the burden of demonstrating that stipulated penalties are
25 warranted by proving noncompliance with Sections 2.2 and 2.3 by a preponderance of the
26 evidence. As used in this Section 2.4.1, the sale of any number of Products from a single lot
27 shall constitute an "Occurrence," provided however that if Products from more than one lot are
28 tested, or are collected for testing, by or on behalf of CEH under Section 2.4 during the same

1 Testing Period and are subject to stipulated penalties in this Section 2.4.1, all of those Products
2 shall fall within a single Occurrence. As used this Section 2.4.1, a "Testing Period" refers to a
3 period of 60 days or less.

4 **2.5 Products in the Stream of Commerce.** Any Products that have been
5 manufactured, distributed, shipped, or sold, or that are otherwise in the stream of commerce prior
6 to the Compliance Date shall be released from any claims that were brought or that could be
7 brought by CEH in the Complaint, as though they were Covered Claims within the meaning of
8 Section 7.1. As a result, the obligations of this Section 2 do not apply to such Products.

9 **3. SETTLEMENT PAYMENTS**

10 **3.1 Penalty.** Defendant shall pay to CEH \$2,500 as a penalty pursuant to
11 Health and Safety Code § 25249.7(b). CEH shall apportion such payment in accordance with
12 Health and Safety Code §25249.12.

13 **3.2 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
14 \$12,000 in lieu of any additional penalty pursuant to Health and Safety Code § 25249.7(b). CEH
15 shall use such funds to continue its work protecting people from exposures to toxic chemicals. As
16 part of this work, CEH intends to conduct periodic testing of the Products as set forth in Section
17 2.4. The payment required under this Section shall be made payable to CEH

18 **3.3 Attorneys' Fees and Costs.** Defendant shall pay \$25,500 to reimburse
19 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any
20 other costs incurred as a result of investigating, bringing this matter to Defendant's attention,
21 litigating and negotiating a settlement in the public interest. The payment required under this
22 Section shall be made payable to Lexington Law Group.

23 **3.4 Delivery of Payments.** All payments made pursuant to this Section 3 shall
24 be delivered to the Lexington Law Group at the address set forth in Section 11.1 and shall be
25 delivered within 10 days of entry of this Consent Judgment.

26 **4. MODIFICATION OF CONSENT JUDGMENT**

27 **4.1** This Consent Judgment may be modified by written agreement of CEH
28 and Defendant, or upon motion of CEH or Defendant as provided by law. Grounds for such

1 modification include, but are not limited to, any change in law that would (1) render Proposition
2 65 inapplicable to the Products or to DEHP, or (2) establish a compliance standard that would
3 allow concentrations of DEHP and/or any Listed Phthalate in the Products to exceed 600 ppm
4 without a Proposition 65 warning.

5 **5. ENFORCEMENT OF CONSENT JUDGMENT**

6 **5.1** CEH may, by motion or application for an order to show cause, enforce the
7 terms and conditions contained in this Consent Judgment. Should CEH prevail on any such motion, it
8 shall be entitled to recover its reasonable attorneys' fees and costs associated with enforcing the
9 Consent Judgment.

10 **6. APPLICATION OF CONSENT JUDGMENT**

11 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
12 hereto, their divisions, subdivisions, parents and subsidiaries, and the successors or assigns of any of
13 them.

14 **7. CLAIMS COVERED AND RELEASE OF CLAIMS**

15 **7.1** This Consent Judgment is a full, final and binding resolution between
16 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in
17 the Complaint against Defendant (including any claims that could be asserted in connection with
18 any of the Products covered by this Consent Judgment) or its parents, subsidiaries or affiliates,
19 divisions, and all of their directors, officers, employees, agents, attorneys, distributors, wholesalers,
20 retailers (including but not limited to Rite Aid Corporation), or customers (collectively,
21 "Defendant Releasees") based on failure to warn about alleged exposures to DEHP resulting
22 from any Products manufactured, distributed or sold by Defendant ("Covered Claims") on or prior to
23 the date of entry of this Consent Judgment. CEH, its directors, officers, employees and attorneys
24 hereby release all Covered Claims against Defendant Releasees. Compliance with the terms of
25 this Consent Judgment constitutes compliance with Proposition 65 with regard to exposures to
26 Listed Phthalates from the Products.

27 **7.2** Within 10 days of entry of this Consent Judgment, CEH shall file a
28 request for dismissal of the action without prejudice as to Rite Aid Corporation in the case

1 entitled *Center for Environmental Health v. Basic International, Inc. dba Basic Medical*
2 *Industries, Inc., et al.*, San Francisco Superior Court Case Number CGC 09-494337.

3 **8. SEVERABILITY**

4 **8.1** In the event that any of the provisions of this Consent Judgment are held
5 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
6 affected.

7 **9. GOVERNING LAW**

8 **9.1** The terms of this Consent Judgment shall be governed by the laws of the
9 State of California.

10 **10. RETENTION OF JURISDICTION**

11 **10.1** This Court shall retain jurisdiction of this matter to implement and enforce
12 the terms this Consent Judgment.

13 **11. PROVISION OF NOTICE**

14 **11.1** All notices required pursuant to this Consent Judgment and correspondence
15 shall be sent to the following:

16 For CEH:

17 Mark N. Todzo
18 Lexington Law Group
1627 Irving Street
San Francisco, CA 94122

19 For Defendant:

20 Trenton H. Norris
Arnold & Porter LLP
275 Battery Street, Suite 2700
21 San Francisco, CA 94111

22 **12. COURT APPROVAL**

23 **12.1** CEH will comply with the settlement notice provisions of Health and Safety
24 Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003. If this Consent
25 Judgment is not approved by the Court, it shall be of no force or effect.
26
27
28

1 **13. EXECUTION AND COUNTERPARTS**

2 **13.1** The stipulations to this Consent Judgment may be executed in
3 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
4 document.

5 **14. AUTHORIZATION**

6 **14.1** Each signatory to this Consent Judgment certifies that he or she is fully
7 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter
8 into and execute the Consent Judgment on behalf of the Party represented and legally bind that
9 Party. The undersigned have read, understand and agree to all of the terms and conditions of this
10 Consent Judgment. Except as explicitly provided herein, each Party is to bear its own fees and
11 costs.

12 **AGREED TO:**

13 **CENTER FOR ENVIRONMENTAL HEALTH**

14 

15 _____
16 Charlie Pizarro, Associate Director

Dated: Feb 27, 2011

17 **CYPRESS MEDICAL PRODUCTS LLC**

18 _____
19 _____
20 _____

Dated: _____

21 [Name]

22 [Title]

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11 costs.

12 **AGREED TO:**

13 **CENTER FOR ENVIRONMENTAL HEALTH**

14
15 _____
16 Charlie Pizarro, Associate Director

Dated: _____

17 **CYPRESS MEDICAL PRODUCTS LLC**

18
19 _____
20
21  _____
22 [Name]

Dated: 2/22/11

23 SVP & CFO
24 _____
25 [Title]

ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Cypress Medical Products LLC, the settlement is approved and the clerk is directed to enter judgment in accordance with the terms herein.

Dated: APR 20 2011

PETER J. BUSCH
Judge, Superior Court of the State of California

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EXHIBIT A

- Sample as received from customer is ground or cut into small pieces.
- Approximately 1g of sample is weighed out to the nearest 0.1 mg.
- Per ASTM D297, sample is extracted in ethyl ether for 16 hours at reflux temperature.
- Sample extract is dried and quantitatively reconstituted to the appropriate level with chloroform and placed into GC/MS vial.
- Sample extract is analyzed by GC/MS technique.
- Chemicals that are targeted for quantification are identified in each sample chromatogram and their peaks integrated for area determination.
- Past controls of specified concentrations of target chemicals are observed and used as a guideline for the preparation of new controls.
- Three or more new controls of known concentration level are prepared for each concentration range to establish the appropriate quantification/calibration curve.
- The quantification curves, encompassing the low and high unknown sample chemical concentrations, are then used to calculate the concentration of targeted chemicals in each sample.